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No. 83-203

In the Supreme Court of the United States

OCTOBER TERM, 1983

BERNARD BARNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Count One of the indictment impermissibly charged a "conspiracy to attempt" to possess and distribute narcotics.

2. Whether the district court improperly coerced a compromise verdict by its supplemental "*Allen* charge."

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OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. 1a-4a) nor the opinion of the district court (Pet. App. 5a-7a) is reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. The petition for a writ of certiorari was filed on August 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an indictment filed in the United States District Court for the Southern District of New York, petitioner, together with co-defendant Robert Brown, was charged with one count of conspiring to violate 21 U.S.C. 841(a)(1), which makes it unlawful "to manufacture, distribute, or dispense,

or possess with intent to manufacture, distribute, or dispense, a controlled substance" (Count One),[1] and with one count of attempted distribution and possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count Two). Pet. App. 8a-9a.[2] Following a jury trial, petitioner was convicted on Count One and acquitted on Count Two (Tr. 451). He was sentenced to ten years' imprisonment. The court of appeals affirmed. Pet. App. 1a-4a.

1. The evidence adduced at trial established that petitioner and Brown negotiated with undercover Drug Enforcement Administration agents for the purchase of a large amount of heroin. The negotiations began in July 1982, when an undercover agent, posing as a seller of large quantities of heroin, was introduced to Brown by an informant (Tr. 29-36). The agent and a second undercover agent, Julio Mercado, participated in a series of meetings with Brown during July and August in which they discussed the purchase of heroin, but no final deal was arranged because Brown was having trouble raising the money (Tr. 39-45, 67-78).

Petitioner accompanied Brown to a meeting with Agent Mercado on September 14, 1982, at which Brown told Mercado that petitioner had all the money they needed. Brown and petitioner then negotiated with Mercado for the purchase of two kilograms of heroin, for which they agreed to pay a deposit of $150,000 and another $150,000 two

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[1]The other statutory provisions cited in Count One, 21 U.S.C. (& Supp. V) 812 and 841(b)(1)(A), simply establish schedules of controlled substances and provide the penalties applicable to violations of Section 841(a)(1), respectively.

[2]Co-defendant Brown was also charged in a third count with possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 10a. He pleaded guilty to Count Two. Tr. 2.

weeks later (Tr. 79-80, 88-94). The following day Mercado met Brown and petitioner; petitioner handed Mercado a bag of money and Brown told Mercado that they had only raised $100,000 but would pay the balance of $200,000 in two weeks (Tr. 95-104, 324). Petitioner reassured Mercado: " 'You can look at it. All counted and stacked nea'ly. You know, you got to remember it was an overnight thing' " (Tr. 104, 324). Brown and petitioner were arrested as Mercado returned to his car to get the purported heroin (Tr. 104-105).

2. On the afternoon of the second day of deliberations, after the jury already had deliberated for more than nine hours, it sent the district court a note stating (Tr. 447): " 'It appears at this time that the jury members cannot arrive at a unanimous agreement. It seems impossible to move anywhere.' " The court then instructed the jury as follows (Tr. 447-449):

> Ladies and gentlemen, last night I mentioned to you that I recognized that it was hard work to deliberate, and I do.
>
> I received your note which indicates that you are having difficulty arriving at a unanimous verdict. I am going to ask you to deliberate again.
>
> You have indicated that you could not reach a verdict. I want you to consider some other things.
>
> This is an important case. The trial has been expensive, both in time and in money, both to the defense and to the prosecution. If you fail to agree on a verdict, the case is left open and is going to be retried again. Another trial can only serve to increase the cost in both time and money to both sides.
>
> There is no reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source that you were chosen. There is no reason to believe that the case could ever be submitted to twelve men and women more conscientious or impartial or more competent to decide it or for that matter, clearer evidence could be produced.

If a substantial majority of your members are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it appears to make no effective impression upon the minds of the others.

On the other hand, if the majority or even a lesser number of you are for acquittal, the other jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have a reasonable doubt of the judgment which is not shared by several of their fellow jurors and whether they should distrust the weight and sufficiency of the evidence which fails to convince several of their jurors beyond a reasonable doubt.

Remember, please, at no time should any juror yield a conscientious conviction that he or she may have as to the weight and the effect of the evidence.

Remember, also, that after full deliberation of the evidence in this case, it is your duty to agree upon a verdict, if you can do so without surrendering your conscientious convictions.

I am not going to rush you at your attempt to arrive at a verdict. On the other hand, if after a period of time you find that you are still at an impass[e], I want you to let me know about that fact.

> I want you to consider these factors, which I am sure you may just have overlooked in the work of deliberations. Consider all of the other things that I told you about in this case and the law.
>
> If you can reach a verdict, do so. If you cannot, let me know.

The jury returned its verdict approximately one hour later.

ARGUMENT

1. Petitioner first contends (Pet. 3-10) that Count One of the indictment charged him with "conspiracy to attempt" to distribute narcotics and therefore does not allege a federal crime. He relies on *United States* v. *Meacham*, 626 F.2d 503, 506-509 (1980), in which the Fifth Circuit held that "conspiracy to attempt" charges based on 21 U.S.C. 846 and 963, which make it unlawful to conspire or attempt to commit any substantive narcotics offense, failed to state offenses because there was no independent, substantive provision of the narcotics laws making unlawful the attempt to violate those laws. That decision is inapposite, however, because the indictment in this case did not allege a "conspiracy to attempt." As both the district court and the court of appeals correctly concluded (Pet. App. 2a, 5a-6a), the indictment charged, and the judge instructed the jury that in order to convict it had to find, that petitioner had participated in a conspiracy to distribute heroin, not a conspiracy to attempt to distribute it.

The first paragraph of the indictment clearly states the conspiracy charged by the grand jury in Count One (Pet. App. 8a):

> From on or about the 1st day of January, 1982 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of

> New York, the defendants, ROBERT BROWN and BERNARD BARNETT, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

As noted above (pages 1-2, *supra*), Section 841(a)(1), which petitioner was accused of conspiring to violate, makes it a crime to "distribute * * * or possess with intent to * * * distribute * * * a controlled substance." By its terms, it does not penalize attempts to do so. Accordingly, the indictment charges in a clear and straightforward manner that petitioner and Brown conspired to distribute narcotics, not merely to attempt to do so.

Petitioner ignores this clear statement of the charge, and focuses instead on the second paragraph of the indictment. But that portion of the charge does not state the object of the conspiracy, but only part of the means by which it was carried out. The second paragraph thus states merely that "[i]t was part of said conspiracy" that petitioner and Brown would "distribute and attempt to distribute and possess and attempt to possess with intent to distribute" heroin (Pet. App. 8a). This elaboration of the activities of the conspirators in pursuit of their illegal end, however, cannot obscure the fact that the offense clearly charged as the object of the criminal agreement was the distribution of controlled substances, in violation of Section 841, not attempted distribution.

Petitioner also argues (Pet. 7-8) that the fact that the case involved a "reverse operation," *i.e.*, a transaction in which the undercover agents purported to sell a controlled substance, which actually was flour, rather than to purchase narcotics, demonstrates that Count One was intended to

charge a "conspiracy to attempt." Petitioner relies especially (Pet. 7) on the fact that Count Two of the indictment charged an attempt to distribute and possess with intent to distribute, rather than actual distribution and possession (see Pet. App. 9a),[3] and on his assertion (Pet. 7) that, "[i]n the usual case," the "indictment * * * charges the defendant in Count 1 with conspiracy to violate the laws forbidding sale, possession and distribution of controlled substances, and in Count 2 with the actual sale, etc." However, the fact that Count Two alleged that, in addition to *conspiring* to distribute heroin over a period of time, petitioner and Brown also *attempted* to distribute and possess heroin on a particular occasion says nothing whatever about the object of the conspiracy charged in Count One. Surely conspirators who agree to commit a crime also may attempt to accomplish their ends, or may even succeed in committing the substantive crime. But whether the conspirators succeed, fail, or are apprehended before their plans ripen into even an attempt, the object of their original agreement remains the same.

For the same reason, the statements of the prosecutor and the instructions of the district court on which petitioner relies (Pet. 8-9), to the effect that the object of the charged conspiracy was a violation of the narcotics laws and that the substantive narcotics violation charged was the attempted possession and distribution of heroin, did not amount to a charge of "conspiracy to attempt." To the contrary, as the court of appeals noted (Pet. App. 2a), both the prosecutor in her closing argument (Tr. 356-357) and the district court

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[3]Contrary to petitioner's suggestion (Pet. 7-8), petitioner and Brown would have been charged with attempted, rather than actual, possession and distribution even if real heroin had been involved, since petitioner and Brown were arrested before ever receiving the purported controlled substances. See page 3, *supra*.

in its instructions (Tr. 406-407) distinguished between the conspiracy alleged in Count One and the attempt charged in Count Two and made it clear that the conspiracy alleged was a conspiracy to distribute narcotics, not a conspiracy to attempt to do so.[4]

2. Petitioner also contends (Pet. 10-18) that the district court, by its supplemental instruction (see pages 3-5, *supra*), improperly coerced the jury into returning a compromise verdict. He urges the Court to reexamine the validity of the so-called *Allen* charge, first approved in *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896), because of an alleged conflict among the courts of appeals and with some state courts concerning the propriety of such an instruction. This claim too is without merit.

It is true that some courts have directed, in the exercise of their supervisory powers, that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Talliaferro*, 558 F.2d 724, 725 (4th Cir. 1977) (per curiam), cert. denied, 434 U.S. 1016 (1978); *United States* v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973) (en banc); *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); *United States* v. *Fioravanti*, 412 F.2d 407, 414-420 (3d Cir. 1969). No court of appeals, however, has found the *Allen* charge to be per se coercive or held that it violates any constitutional right. And all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

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[4]The prosecutor explained (Tr. 357) that Count One "charges [petitioner], Brown and others unknown with conspiring * * * to possess heroin in order to distribute it to others." The district court likewise instructed (Tr. 407): "Count 1 charges that the defendants * * * conspired to violate the federal law prohibiting the distribution of narcotics and the possession of narcotics with the intent to distribute them."

As the court of appeals concluded here (Pet. App. 3a), the charge in this case, given when the jury informed the court of an impasse after approximately ten hours of deliberation, was balanced and did not prejudice petitioner. The district court warned that under no circumstances may a juror relinquish a conscientious judgment, it advised that it would not rush the jury, and it stated that the minority of jurors, whether they presently believed petitioner's guilt had or had not been proven, should simply reconsider in light of the position taken by their colleagues. Most significantly, the court instructed that even if only a *minority* of the jurors were inclined toward acquittal, members of the *majority* should reconsider their position. See *United States* v. *Angiulo*, 485 F.2d at 39; *United States* v. *Fioravanti*, 412 F.2d at 416-417. This modified *Allen* charge was not coercive and was well within the permissible limits of a charge designed to provide "encouragement to the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial." *United States* v. *Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976).[5]

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction in a context in which some variation in practice among the circuits is tolerable. Accordingly,

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[5]Petitioner contends (Pet. 17) that coercion is proved by the jury's having returned inconsistent verdicts on the two counts of the indictment in which petitioner was charged. As the court of appeals observed (Pet. App. 3a), however, the verdicts were not "plainly inconsistent." Indeed, contrary to petitioner's assertion (Pet. 17), the jury might well have disbelieved his claim that he was unaware that the transaction involved narcotics, and therefore have convicted him on the conspiracy count, and nevertheless have acquitted him on the attempted distribution count on the ground that his actions did not go far enough to constitute an attempt. There is no inconsistency in two such verdicts.

the issue does not warrant review by this Court at the present time. Indeed, subsequent to the decisions relied on by petitioner this Court has consistently denied certiorari in other cases presenting similar claims. See *Herko* v. *United States*, 444 U.S. 943 (1979); *Braverman* v. *United States*, 439 U.S. 964 (1978); *Dyba* v. *United States*, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, 424 U.S. 970 (1976); *Lee* v. *United States*, 422 U.S. 1044 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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